EXHIBIT E

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VIA EMAIL

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Re: Violation of the California Voting Rights Act and Intentional Discrimination in the 1946 Adoption of At-Large Elections for the Santa Monica City Council

We write to you at the request of several Latino residents of the Pico Neighborhood of Santa Monica.

The City of Santa Monica ("Santa Monica") relies upon an at-large election system for electing candidates to its City Council. It also appears that voting within Santa Monica is racially polarized, resulting in minority vote dilution, and therefore Santa Monica's at-large elections are violative of the California Voting Rights Act of 2001 ("CVRA").

Moreover, Santa Monica's current at-large election system is the result of intentional discrimination against Santa Monica's minority residents in 1946. At that time, the at-large election system was adopted specifically to prevent the ethnic minority residents of

Santa Monica, residing principally in the southern portion of Santa Monica, from achieving representation on the Santa Monica City Council.

Santa Monica's At-Large Elections Violate the CVRA

The CVRA states in relevant part:

> 14027. An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.
>
> 14028. (a) A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. …

While Santa Monica is a charter city, and charter cities are granted certain autonomy over the manner and method of their elections, it is now well settled that the CVRA preempts any conflicting charter provision regarding at-large elections. Specifically, in a case that the undersigned counsel successfully argued, the Court of Appeals found that the CVRA is equally applicable to charter cities, and controls over conflicting charter provisions, because it is narrowly tailored to addressing matters of statewide concern – the right to vote, equal protection, and the integrity of the electoral process. *Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781, 798-804, review denied en banc (Aug. 20, 2014).

Based on our analysis, Santa Monica's at-large system dilutes the ability of minority residents – particularly Latinos (a "protected class") – to elect candidates of their choice or otherwise influence the outcome of Santa Monica's council elections.

The key to determining whether an at-large election violates the CVRA, is determining whether there is racially polarized voting. *See* Cal. Elec. Code §14028 ("A violation of Section 14027 ***is established*** if it is shown that racially polarized voting occurs in elections …" Racially polarized voting is "voting in which there is a difference ... in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." *Id.* § 14026(e). Racially polarized voting shall be determined from examining results of elections in which "one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of a protected class." *Id.* § 14208(b).

Our research shows that in the history of the Santa Monica city council, spanning more than a hundred years, only one Latino has ever been elected to the city council, and there

has never been a Latino resident of the Pico Neighborhood, where Latinos are concentrated, elected to the Santa Monica city council. Latino residents of the Pico Neighborhood have run in several recent elections for the Santa Monica city council, and though they have been preferred by both voters in the Pico Neighborhood and by Latino voters generally, they have all lost due to the costly and discriminatory at-large system by which Santa Monica elects its city council.

Though not necessary to establish a violation of the CVRA, a history of discrimination, and the deleterious effects of that past discrimination on the protected class and its ability to elect candidates of its choice, are also relevant. *Id.* § 14208(e). Though Santa Monica is regarded by many to be one of the more progressive cities in the State, as explained more fully below, that was not true historically. Rather, Santa Monica has a disturbing history of racial discrimination that is masked by its more recent progressive image. In fact, whatever their intention, even recent decisions of the Santa Monica city council have had a deleterious impact on the Pico Neighborhood where Latinos are concentrated, for example the decisions to de-fund the Pico Youth and Family Center and to burden the Pico Neighborhood with the maintenance facility for the light rail that is planned to terminate near the much more affluent area around the 3rd St. Promenade. For Latinos residing in the Pico Neighborhood, the lack of representation, or prospect of representation, on the Santa Monica city council has led to the general neglect of their community. As revealed by documents recently released in connection with an employment case against Santa Monica, even employment decisions are made by the Santa Monica city council, and so not having appropriate representation on the city council has resulted in a lack of concern for the Latino community of the Pico Neighborhood from Santa Monica's administration as well as its city council.

As you may be aware, in 2012, we sued the City of Palmdale for violating the CVRA. After an eight-day trial, we prevailed. We then prevailed in successive appeals, and writ petitions, and the trial court's judgment was affirmed in June 2015. After spending millions of dollars, district-based elections are now ultimately being imposed upon the Palmdale city council, with districts that combine all incumbents into one of the four districts. Moreover, in addition to the estimated $2.5 million paid by the City of Palmdale to its attorneys, the City of Palmdale was required to pay us more than $4.6 million for our efforts.

Given the historical lack of Latino representation, and particularly from the Pico neigborhood, on the city council in the context of racially polarized elections, we urge Santa Monica to voluntarily change its at-large system of electing council members. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief.

<u>Santa Monica's At-Large Elections Are the Result of Intentional Discrimination in 1946</u>

Even if Santa Monica's at-large election system could withstand a challenge based on the

CVRA (it cannot), it would still fall as it was adopted with the purpose of discriminating against Santa Monica's ethnic minority population residing in the southern portion of the city. That fact alone – that the 1946 adoption of at-large elections was generally motivated by a desire to disenfranchise ethnic minorities – makes the at-large election system unconstitutional today. *See, e.g., Hunter v. Underwood*, 471 US 222 (1985) (invalidating a suffrage provision of the 1901 Alabama Constitution Convention even though it was adopted 84 years earlier).

This should come as no surprise to Santa Monica. In 1992, the Santa Monica city attorney retained renowned discrimination expert, Dr. J. Morgan Kousser, to evaluate whether the at-large election system was adopted with a discriminatory intent. Dr. Kousser investigated the matter, and prepared a detailed report, concluding that the 1946 adoption of at-large elections for the city council was likely motivated by a desire to keep ethnic minorities, concentrated in the southern portion of the city, from achieving electoral success and gaining representation on Santa Monica's city council. A copy of Dr. Kousser's report is attached for your convenience.

Despite Dr. Kousser's conclusions, solicited by the Santa Monica city attorney, Santa Monica has not taken the necessary actions to correct this historic wrong. Rather, the at-large election system has accomplished exactly what it was intended to do – disenfranchise the minority residents living in the less-wealthy neighborhoods in the southern portion of Santa Monica, namely the Pico Neighborhood. While district-based elections would ensure that the Latino residents of the Pico Neighborhood enjoyed fair and equal representation in their local government, Santa Monica's current at-large system has prevented residents of the Pico Neighborhood from being elected to the city council, despite strong support from Latinos and the Pico Neighborhood.

Please advise us no later than January 11, 2016 as to whether you would like to discuss a voluntary change to your current at-large system.

We look forward to your response.

Very truly yours,

Kevin I. Shenkman

SUMMARY

Could someone make a plausible prima facie legal case that the at-large election system in Santa Monica was adopted and/or maintained with a racially discriminatory purpose? After reviewing the legal standards for proving such a case under the federal Voting Rights Act, I present facts drawn from a preliminary examination of two episodes, the adoption of the council-manager government in 1946 and the defeat of a referendum that would have substituted district for at-large elections in 1975. Since convenient summaries of those facts may be located in the paragraphs numbered 34, 35, and 42, below, I will not restate them here.

My basic conclusions are, however, worth underlining: Although legal cases are always difficult to predict, there are enough signs of a racially discriminatory intent in the adoption of the charter in 1946 that, if someone brought a case, the city would have to defend itself. Because voting rights law is quite specialized, most jurisdictions that are sued either settle before trial or hire expensive outside counsel. Los Angeles County ended up spending more than $12 million on its recent redistricting suit. The case for a discriminatory purpose in 1975 is much weaker than that for 1946, but if a court were to find a discriminatory intent in *either* instance, the city would lose the case, according to current case law. If Santa Monica wishes to avoid the embarassment of defending itself against a serious charge of racial discrimination, and if it prefers spending scarce resources on things other than high-priced lawyers, it should replace the at-large system with election by districts.

REPORT OF J. MORGAN KOUSSER

I. CREDENTIALS

1. I am a professor of History and Social Science at the California Institute of Technology and the author of *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (Yale University Press, 1974), as well as 32 scholarly articles, 48 book reviews, and 23 papers at conventions. I have served as an expert witness in nine federal voting rights cases and a consultant in six others, and I testified before a subcommittee of the U.S. House of Representatives in 1981 about the renewal of the Voting Rights Act. I was the principal expert witness on the intent issue for the Mexican-American Legal Defense and Education Fund in the Los Angeles Supervisors' redistricting case. I was educated at Princeton and Yale, and have taught at Michigan, Harvard, and Oxford, in addition to Caltech. My curriculum vitae is attached to this report as an appendix.

II. SCOPE OF THE INQUIRY

2. I have been asked by representatives of the Santa Monica City Attorney's office to examine whether there is evidence that the at-large system of elections for members of the City Council and the Board of Education was adopted or maintained with a discriminatory purpose. Since the time for my investigation was very short, my research has not been exhaustive by any means, and my conclusions should be regarded as quite tentative. Further research might uncover more corroborative or

more contradictory evidence.

III. HOW HISTORIANS AND JUDGES DETERMINE INTENT

A. THE NINE INTENT FACTORS

3. How does a historian uncover the motives of the framers of an electoral structure? In "How To Determine Intent: Lessons from L.A.", a 141-page published paper based on my testimony in the Los Angeles County redistricting case and other cases, on other federal court opinions, and on the practices of historians, I have set out nine "intent factors." Depending on the evidence available, which is always more scanty than we would prefer, we would put more emphasis on one factor, less on another.

4. The first factor is models of human behavior in particular situations, which are often drawn from experience or research. For instance, have at-large elections been used elsewhere to make it more difficult for members of protected minority groups to elect candidates of their choice? The answer is, of course, yes, and the more historians and expert witnesses learn about such instances, the more they find discriminatory purposes and effects in at-large systems. Indeed, most of the major U.S. Supreme Court decisions on the Voting Rights Act in the last twenty years have involved challenges to at-large electoral systems: *White* v. *Regester* (412 U.S. 755 (1973)), *City of Mobile* v. *Bolden* (446 U.S. 55 (1980)), *Rogers* v. *Lodge* (458 U.S. 613 (1982)), and *Thornburg* v. *Gingles* (478 U.S. 30 (1986)). This creates a rebuttable presumption, a hunch that when we find an at-large system being set up or maintained, we might expect to find evidence of a discriminatory purpose.

5. The second factor is the historical context. Were racial issues or political campaigns by members of minority groups important at the time and place? In the County Supervisors' case, for instance, it was significant that there was special redistricting in 1959 that resulted in a large shift of Anglo voters in West Los Angeles, Beverly Hills, and West Hollywood from the Fourth to the Third District. This came less than a year before the census was to be taken and just after a very close contest in the Third District in which an Anglo candidate defeated a Mexican-American.

6. A third factor may be the exact text of a law or the exact lines of a redistricting, and a fourth is basic demographic facts. How many members of relevant minority groups were there, how concentrated were they, and what were the trends in the population? In the Supervisors' case, for instance, the rapid growth of the Latino population in an area split between two supervisorial districts was an important fact that did not escape the attention of those who drew district lines.

7. Two basic political facts that constitute the fifth factor are the number of minority group members elected and the approximate extent of racial polarization among the voters. The former is a measure of effect, and the latter, insofar as it is widely known, can be assumed to inform the decisions of those who design electoral structures. For example, in Los Angeles County before 1991, it was well known that no Latino had served as a supervisor in this century, and it was widely understood that Latino candidates had little chance to win elections in overwhelmingly Anglo districts. Therefore, redistricters had to have been well aware that districts that contained large majorities of Anglo voters were extremely unlikely to elect candidates that were the first preferences of Latinos.

8. The sixth and seventh factors are the background of key decisionmakers and other actions that they performed. Were they all white? Did they allow minority groups a real forum in which they could express themselves on the decision? What other policies that affected minority groups did the decisionmakers favor and carry out?

9. Sometimes, decisionmakers will make what are termed "smoking gun" statements, and they constitute the eighth factor. When a "numbered post" system was substituted for a "free-for-all" at-large election system in Memphis, Tennessee in 1959, a newspaper article on the relevant bill stated "Bill Has Racial Purpose." The story, based on interviews with proponents, went on to explain at length just how blacks would be disadvantaged by the change.

10. State policies and formal and informal institutional rules constitute the final factor. If a locality is merely following a mandated state policy (for instance, one providing for at-large elections for all cities of a specified size range), then it is difficult to attribute any particular motive to the locality. Departures from usual rules or practices may hint at ulterior motives. In a recent case decided by the U.S. Supreme Court, boards of county supervisors in Alabama changed the rules to strip individual board members of powers that they had previously had just after the first election of a black to the board. Although the Court decided that such a move did not have to be precleared by the Justice Department, it seems likely that it could be challenged as intentionally discriminatory under section 2 of the Voting Rights Act or the Fourteenth Amendment.

B. LEGAL STANDARDS: MIXED MOTIVES, HOSTILITY, ORIGINAL INTENT,

AND MAINTENANCE

11. The motives of human beings are often complex and the existing evidence about them, imperfect. Does that mean that we can say nothing about purposes? Must we accept stated reasons for actions? If we find plausible "good" motives for some action, must we disregard "bad" motives for the same action? Must we so precisely weigh "good" against "bad" motives that we can say that "bad" motives were important if and only if we can show that the "bad" motives were necessary for the action to occur? I believe the answer to all these questions is no, and that the case law on voting rights supports this answer.

12. In *Hunter* v. *Underwood* (471 U.S. 222 (1985)), Justice Rehnquist, speaking for a unanimous Supreme Court, invalidated a suffrage provision of the 1901 Alabama Constitution largely on the grounds that the convention that instituted the provision was generally motivated by a desire to disfranchise African-Americans. He dismissed the state's argument that the convention wished to disfranchise poor whites, too, as irrelevant, and he made no serious attempt to weigh the importance of each motive. A clear racially discriminatory purpose, the Court held, fatally infected the constitutional convention's actions. In the Los Angeles County Supervisors' case, Federal District Judge David V. Kenyon thought it sufficient to find that "the Board has redrawn the supervisorial boundaries over the period 1959-1971, *at least in part*, to avoid enhancing Hispanic voting strength in District 3....The Supervisors appear to have acted *primarily* on the political instinct of self-preservation. The Court finds, however, that the Supervisors *also* intended what they knew to be the likely result of their actions and a prerequisite to self-preservation -- the continued fragmentation of the Hispanic Core and the dilution of Hispanic voting strength." (*Garza* v. *Los Angeles County Board of Supervisors*, 756 F. Supp. 1298, at 1317-18 (1990), emphasis

added.) Affirming Judge Kenyon's opinion, a unanimous Appeals Court declared explicitly that "the discrimination need not be the sole goal in order to be unlawful." (*Garza* v. *Los Angeles County Board of Supervisors*, 918 F.2d 763, at ? (1990))

13. To prove a discriminatory intent, must those who took some action be motivated by racial hostility, or, if they claim not to have been, must we accept their protestations at face value? Again, I think that the answers are no, and that judges' opinions agree. Many American defenders of slavery claimed to be doing blacks a favor by bringing them from a "barbarian" to a "Christian" country, and they purported to treat their slaves kindly, as they might dependent children. Those white politicians who disfranchised African-Americans in the South at the turn of the century often asserted that they meant no racial harm, but that since blacks (they insisted) were inherently incapable of voting responsibly, to strip them of their votes was merely to act in the best interest of society. Naturally, we would reject such outrageous apologetics as racist today. In the Ninth Circuit Court of Appeals' decision in the *Garza* case, conservative Republican Judge Alex Kosinski asked rhetorically whether there could be "intentional discrimination without an invidious motive," and he gave a homely example to demonstrate that there could be: "Assume you are an Anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood." (*Garza* v. *Los Angeles County Board of Supervisors*, 918 F. 2d 763, at 778)

14. Even if an action was originally taken with a racially discriminatory intent, might not the passage of years wipe that motive away? If there was no discriminatory motive in the beginning, shouldn't the motives of those who merely continued the system be irrelevant? Again, the answers seem to me to be negative. In the remand trial of *Mobile* v. *Bolden* and a companion school board case, in both of which I testified, the laws establishing at-large electoral systems were traced to the 1870s. In both cases, the federal district court found that this original taint invalidated the system. (*Bolden* v. *City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982); *Brown* v. *Board of School Commissioners of Mobile County* (542 F. Supp. 1078 (S.D. Ala. 1982), aff'd 706 F. 2d 1103 (11th Cir. 1983), aff'd 474 U.S. 1005 (1983)) In *County Council of Sumter County, S.C.* v. *U.S.* (555 F. Supp. 694 (D.D.C. 1983), another case in which I testified, the motives for both the adoption and the maintenance of an at-large system for local offices were at issue. In a unanimous decision joined in by Judge Robert Bork, the system of at-large elections was invalidated at least partially because of discriminatory maintenance. In *Garza*, the Appeals Court ruled that in cases in which a discriminatory intent was proved, plaintiffs merely had to make *some* showing of injury, and that they did not have to prove that voters from one ethnic group could form a majority of a proposed district. (*Garza* v. *Los Angeles County Board of Supervisors*, 918 F. 2d 763, at ? (1990)

15. In sum, it is possible to prove intent to judges' satisfactions, and relevant "bad" motives generally invalidate an action. One does not have to demonstrate blatant racial hostility or to accept at face value protestations of virtuous intentions. A system *either* established *or* maintained with a discriminatory purpose is invalid under the Constitution or the Voting Rights Act.

IV. BASIC HISTORICAL AND DEMOGRAPHIC FACTS

16. From 1907 to 1914, when Santa Monica was a very small town, it was governed by a mayor and a council of seven persons, elected by wards. In 1914, for reasons that I have not yet investigated, the town switched to a commission form of government, in which there were three commissioners, with separate responsibilities, elected at large.[1] A measure to replace the commission with a council-manager form of government failed in 1932, and moves to force another vote by the people during the late 1930s were frustrated by opposition from Mayor Ed Gillette.[2] In December, 1945, the *Outlook* led a successful effort to authorize a Board of Freeholders to revise the city charter, and 13 of the 15 members elected were endorsed by the newspaper.[3] After a long struggle between those who favored electing the council by districts and those who preferred at-large contests, the Freeholders' new council-manager, all at-large charter was ratified by the city's voters.[4] Attempts to substitute a district system failed to qualify for the ballot in 1971 and more recently, and voters rejected the change at a referendum in April, 1975.[5]

17. Population figures for the city provide a relevant background.

Year	*Total Population*	*White or Anglo*	*Nonwhite*	*Black*	*Asian*	*Latino*
1900	3057					
1910	7847					
1920	15,252					
1930	37,146					
1940	53,500	51,691	1809	1265		
1946	67,473	64,415	3058[6]			
1950	71,595	67,955	3640			
1960	83,249	78,122	5127	4060		5145
1970	88,289	81,935	6354	4218		10,668
1980	84,228	65,101	19,127	3565	3617	11,468[7]
1990	86,905	65,184	21,721	3732	5385	12,210

18. As Santa Monica changed from a beach village in 1900 to a substantial town in 1940, its minority population remained negligible. During the Second World War, however, the nonwhite population rose, as the *Outlook* noted warily, by 69%.[8] Seventy to eighty percent of that nonwhite population was African-American, and, although blacks constituted less than five percent of the total, they were apparently concentrated geographically, and their numbers were growing rapidly. Only the building of Interstate 10, which sliced through the heart of the black community bounded roughly by Colorado and Virginia Avenues on the north and south and Cloverfield Blvd. and Euclid St. on the east and west, leveled off the black population at about 4000. The growth of the Latino population is more difficult to trace because census definitions have changed over the years, but it appears that large numbers of Latinos, Asians, and Pacific Islanders moved into the city only after 1970. They now constitute much larger proportions of the city's population than do African-Americans.

V. THE 1946 DECISION TO ELECT THE SANTA MONICA CITY COUNCIL AT-LARGE

A. THE HISTORICAL CONTEXT

19. Race was an issue in Santa Monica in 1946. At the behest of the Los Angeles County Board of Supervisors, Mrs. Vivian Wilken and Judge Orlando H. Rhodes of Santa Monica organized a local "Interracial Progress Committee" in 1945, which held several meetings and workshops, attended by as many as 85 people, on such topics as "The Roots of Intergroup Tensions in This Community."[9] Exactly what they discussed or how successful they were, the *Outlook* did not say, but the committee's very existence does imply that problems existed. Certainly the wartime anti-Japanese fervor that sent so many Japanese-Americans to concentration camps affected Santa Monica, along with the rest of California. Frequent *Outlook* references to "Japs" in the early postwar era demonstrates that fact plainly.

20. In fact, the city's newspaper, even more conservative then than now, casually purveyed racial stereotypes and accepted historical myths that today seem outrageous. A common editorial cartoon figure in the paper in 1946, for instance, was "The Little Savage," an exaggeratedly thick-lipped, grass-skirted, barechested and barefooted African or perhaps Australian native with a stick through his nose.[10] Small, naive, and unthreatening, the outlander merely served as a foil for the exposure of the foibles and contradictions of "civilization." He was not openly ridiculed or persecuted in the cartoons, though of course his exaggerated characteristics were a form of ridicule. But his employment as a stock figure and the lack of any protest against this caricature indicates the widespread acceptance of gross racial stereotypes in Santa Monica at the time the council-manager charter was

being drafted.

21. In Santa Monica, as well as the state as a whole, the issue of racially equal employment opportunity was extremely controversial in 1946. Proposition 11 on the same ballot as the charter revision proposal in November, 1946 provided for a relatively strong state fair employment practices commission (hereafter referred to as FEPC). Backed by the Democratic Party, the state's major labor unions, the Northern California (but not Southern California) Council of Churches, and many veterans groups, it was termed "communistic" by some opponents.[11] The staunchly Republican *Outlook*[12] opposed the FEPC, declaring that only "education and moral suasion" were proper approaches to the race issue, which it called "the most difficult problem which our civilization faces." In a passage that greatly exaggerated the views of even the most extreme pro-southern historians, the newspaper drew its current policy lesson from history that would have seemed outrageously romantic and biased at the time in Mississippi, let alone in California: "The greatest tragedy that ever happened in America was the War Between the States - which most historians believe need never have happened, if the conscience of leading Southerners and the laws of economics had been given another decade in which to work....There was a powerful moral conscience in the South and in all probability it would have freed the slaves in another decade, if hotheads on both sides had not forced the issue and made Southerners feel that they had to fight for their rights and their way of life."[13]

22. Like the state Chamber of Commerce, the Los Angeles and Santa Monica-Ocean Park Chambers of Commerce opposed the FEPC. The Commission, the Los Angeles group declared, would "deny employers the right of obtaining full information about a prospective employee -- race, religion, color, national origin or ancestry -- for the purpose of intelligently appraising an applicant's qualifications for a particular

job."[14] The FEPC, in other words, would not facilitate discrimination.

23. In sum, in Santa Monica on the eve of the decision to adopt an at-large council structure, the black population was growing rapidly, race was an actively discussed issue in the community, and racial stereotypes and openly biased attitudes were widespread among the same leaders who spearheaded the drive for a new charter with citywide elections.

B. THE FREEHOLDERS AND THE DECISION FOR AN ALL AT-LARGE COUNCIL

24. Only one of the fifteen members of the Board of Freeholders, charter opponents pointed out, lived south of Montana, and that person lived north of Wilshire. Led by the Ocean Park Association of Commerce, the Citizens' Civic League, and the then-powerful Central Labor Council, the critics feared that "the largest population centers south of Santa Monica Blvd. will not be represented" unless the council was elected by districts.[15] From the beginning of the Freeholders' meetings, the method of electing councilpersons was the most controversial issue.[16] In March, 1946, the Freeholders first deadlocked, 7-7, on increasing the number of council members to nine, and then voted 10-4 for a 7-member council, all elected at large.[17] After protests and special meetings with representatives of the three dissenting organizations, the Board reaffirmed its decision in May by a 9-6 vote.[18] A month later, "public opinion being divided," the Board passed a compromise measure to allow voters to choose between two proposals, one providing for seven councilpersons, all elected at large, and the other for four persons elected by districts and three at large.[19] Finally, "in an unexpected action," the Freeholders rescinded

their earlier agreement and placed on the ballot only the all at-large plan. Their rationale, the *Outlook* thought, was that "it would not be desirable to confuse the issue by placing both on the ballot, that election at large is the best method and calculated to eliminate 'log rolling' tactics."[20]

25. Those who favored at-large elections condemned districts for fostering logrolling, "horse trading," and "sectionalism."[21] But the issue of the representation of "minority groups," which explicitly included racial minorities, was never far from the surface. Rejecting the city's growing pluralism, the *Outlook* declared that Santa Monica "can and should develop into a remarkably homogeneous community...The cry that 'minorities must be represented' would mean, if carried to its logical conclusion, that every religious group and every neighborhood should have its special representative." The Freeholders "should not allow special groups to write any part of the charter for them..."[22] "The proponents of sectionalism point to the ward system of big cities," the newspaper remarked, "but they forget that groups such as organized labor and the *colored people* do not have the voting power in Santa Monica that they have in New York and Chicago. Here they are minority groups. The interest of minorities is always best protected by a system which favors the election of liberal-minded persons who are not compelled to play peanut politics. Such liberal-minded persons, of high caliber, will run for office and be elected if elections are held at large."[23]

26. Decrying the new charter as "a sinister power grab by the silk stocking element," the "Anti-Charter Committee" published a series of advertisements calling for a rejection of the finished document.[24] One is worth quoting in full:

"MINORITY GROUPS AND THE PROPOSED CHARTER

"The lot of a member of a minority group, whether it be in a location of not-so-

fine homes, or one of race, creed, or color, is never too happy under the best of conditions.

"But--consider what life would be like under a dictatorship type of government as proposed under the charter.

"With seven councilmen elected AT LARGE (and history shows they will mostly originate from NORTH OF MONTANA), and a city manager responsible to the seven councilmen plus a dictatorship that has so long ruled Santa Monica (without regard to minorities) where will these people be?

"The proposed ruling groups control the chief of police - and through him the police force - and the city attorney, the personnel director, the health officer, etc.

"Where will the laboring man go? Where will the Jewish, colored or Mexican go for aid in his special problems?

"Where will the resident of Ocean Park, Douglas district, the Lincoln-Pico and other districts go when he needs help?

"The proposed charter is not fair - it is not democratic.

"It is a power grab - and we plead with all citizens of Santa Monica to protect their interests (vote no) and convince your neighbors to vote NO ON THE PROPOSED CHARTER."[25]

27. Two members of the Board of Freeholders, Vivien Wilken and Rev. Howard P. McConnell, were also active in the Interracial Progress Committee.[26] Wilken was the only candidate for the Board who listed membership in the NAACP in her capsule campaign biography.[27] Although neither is quoted in the newspaper as stating reasons for their positions, both favored reconsidering the Board's all at-large plan in May, and Mrs. Wilken persisted in raising the question again in June, pushing for the compromise proposal to put a mixed district and at-large choice on the ballot.[28] The fact that both of the Board's members who were easily identifiable

as racial liberals opposed the at-large council provides further evidence that the issue was seen as racially tinged.

28. Although all of the members of the Board of Freeholders were Anglo and the *Outlook* does not mention any presentations at hearings on the charter issue by blacks, Latinos, or Asians, the secretary of the Board, Mrs. Jean Leslie Cornett, did appear at a pre-referendum NAACP meeting at the 19th and Michigan African Methodist Episcopal Church to try to stimulate support for the measure. Noting that the charter raised the number of local government members to be elected from three to seven, Mrs. Cornett tacitly acknowledged that the at-large system discriminated against racial minorities and implied that blacks understood the point well. "Admitting that the proposed charter is not perfect in every respect, Mrs. Cornett pointed out that the opportunity for representation of minority groups has been increased two and a half times over the present charter by expansion of the City Council from three to seven members."[29]

C. PUBLIC RACIAL ATTITUDES AND THE ADOPTION OF THE CHARTER

29. In a pro-charter speech before the Nov. 5, 1946 referendum, Board of Freeholders member Ben Banard, a political science instructor who had favored a mixed system of elections, posed a dilemma for voters who were critical of the all at-large structure: "Those who want broader representation of all sections of the city in the new government," Banard said, echoing the argument of Mrs. Cornett, "cannot reject the charter, because seven councilmen are almost certain to assure better geographic representation than the three council members now elected."[30] Despite fervent opposition from the current commissioners and from many in the Ocean Park

area, the new charter passed by a vote of 15,078 to 6497, carrying 106 of the city's 113 precincts in an election that saw 62.7% of the registered voters turn out.[31]

30. The *Outlook* printed the precinct-level returns for the charter and those for the statewide FEPC proposition on its first page the day after the election. Using a statistical method, so-called "ecological regression," that is widely employed in voting rights cases, as well as by historians and political scientists in normal scholarship, I have used these returns to try to determine how who favored and those who opposed the FEPC voted on the charter.[32]

31. Of the 109 precincts for which the *Outlook* published complete returns, the FEPC carried only seven. In those seven, presumably largely populated by blacks, the FEPC got 69.6% of the vote, while in the other 102 precincts, it received only 24.5%. In the same seven precincts, the charter got 57.5% of the vote, while it won 70.8% of the vote in the other 102 precincts.

32. To isolate white racial attitudes, I deleted from the regression analysis the seven precincts where the FEPC won a majority of the vote. In the remaining 102, my estimate is that 93% of those who rejected the FEPC favored the charter, while the remaining 7% of the FEPC opponents opposed the charter. Virtually 100% of the proponents of the FEPC voted against the charter.[33]

33. Although the statistical analysis does not prove that whites supported the charter *because* their attitudes were racially conservative, or that whites with relatively liberal racial attitudes opposed the charter *because* of these beliefs, it does demonstrate an impressive correlation on the two issues. A vote on an FEPC proposition is as good a measure of local racial opinion as one is likely ever to find.

The extent of the correlation is one more piece of evidence in an overall pattern that supports the inference that the at-large structure was chosen over a districted or mixed system partially but importantly because of an intent to deny blacks a fair opportunity to elect candidates of their choice in the future.

D. THE INTENT OF THE 1946 CHARTER SUMMARIZED

34. Could one make a prima facie case that citizens and the Board of Freeholders of the city of Santa Monica in 1946 adopted an all at-large council with a racially discriminatory intent? Whether or not that case would ultimately win, would it be plausible enough that the city would have to defend itself vigorously, probably by hiring expensive outside attorneys who specialize in voting rights litigation? I believe that the answer to both of those questions is yes. It is not so much any one piece of evidence, any "smoking gun," that convinces me as it is the overall pattern.

35. The black proportion of the city's population was growing in 1946, and racial issues were widely discussed in the city and the state. Opinion leaders who were staunch backers of the at-large charter, particularly the *Santa Monica Evening Outlook* and the Santa Monica-Ocean Park Chamber of Commerce, openly expressed or endorsed racially retrogressive attitudes and the newspaper casually employed gross racial stereotypes. The Board of Freeholders was all white, nearly all from the wealthiest part of the city, and there is no record that it consulted with any members of racial minorities during its deliberations. The method of electing councilpersons was the most controversial feature of the new charter, and the Board repeatedly changed its mind and apparently heatedly debated the issue. Both proponents and opponents publicly stated that members of "minority groups" would probably not be able to elect representatives of their choice under an at-large system, and both

explicitly mentioned blacks as one of those "minority groups." Charter opponents also mentioned Latinos. The *Outlook* patronizingly announced to blacks that it would be better for them to coalesce behind white liberals with citywide support than to elect candidates who were their real choice, while charter opponents warned that elite candidates elected citywide would not be sympathetic to minority citizens. Among whites within the city, the correlation between votes on setting up a statewide Fair Employment Practices Commission and votes on the charter with an at-large provision was almost perfect. Those who backed an FEPC opposed the charter, while those who voted negatively on an FEPC favored the charter. In sum, enough of the nine intent factors enumerated above support the contention that the at-large provision was adopted with a racially discriminatory intent to form the core of a potentially winnable case against the city.

VI. WAS THE AT-LARGE SYSTEM MAINTAINED FOR A RACIALLY DISCRIMINATORY PURPOSE IN 1975?

36. In the summer of 1974, a group of young white professionals centered in the Ocean Park area convinced over 10,000 people to sign a petition to switch from at-large elections to a seven-district council and to reduce the number of names necessary to force a recall election from 25% of the registered voters to 10%. Although the petitioners hoped to place the issue on the November ballot, the city council on August 6 voted 4-3 to schedule the vote to coincide with the April, 1975 city election and the city's district attorney threatened to overturn the measure altogether because of small population discrepancies between the districts.[34]

37. The racial and political climate in the city by 1974 was much more mixed than

in 1946. In 1971, the city had elected its first black councilman, Nathaniel Trives, a police officer, and in 1973, after the death of Councilman Anthony Dituri, the Council had named a second African-American, Hilliard Lawson, to Dituri's seat. Mrs. Blanche N. Carter had become the first African-American on the School Board in 1971, and in 1973, Fred Beteta became the first serious Latino candidate for office in the city, running a close fourth for one of the three seats up that year on the School Board.[35] On the other hand, the *Outlook* took the same stand on busing students to integrate the schools as it had nearly 30 years earlier on the FEPC: "Opportunities for minorities will not be improved by unpopular policies, such as busing, which create racial friction. The need, as we have said before, is for conciliation - not coercion."[36] Most of the syndicated columnists that the paper carried, such as Ronald Reagan and the *National Review*'s William Rusher, were extremely conservative on racial and other matters.[37]

38. The racial and ideological overtones of the district/at-large debate were explicitly noted in 1975, as in 1946. Citing a study by the League of California Cities, a news story in the *Outlook* noted that two of the advantages of districts were "the increased chance for ensuring minority representation by drawing boundaries around minority neighborhoods, and reduced campaign costs since city-wide campaigning would not be necessary." Quoting Walter Benedict, a retiring councilman in Pasadena, where a limited district system had been instituted in 1969, the story also noted that "the move towards electing a black director was the main impetus in the 1969 [Pasadena] districting drive....'One result of the new system is a board that is getting less and less representative of the business community,' said Benedict, a plumbing contractor. 'Their orientation now is toward the great social push,' which he defined as the 'welfare state' approach."[38]

39. According to the *Outlook*, Proposition 3, the district proposal, was "the hottest issue in the election, overshadowing the traditionally heated contest for council openings." Backing districts were the League of Women Voters, the Santa Monica Democratic Club, and many residents of Ocean Park. Favoring at-large were the *Outlook*, the board of directors of the Santa Monica Chamber of Commerce, the Santa Monica PTA Council, the Sunset Park Property Owners Association, Howard Jarvis's Apartment House Owners of Los Angeles, the associations of all of the municipal employees, and all the incumbent members of the City Council.[39] Even Nat Trives and Hilliard Lawson, the two black councilmen, mildly opposed the proposition, Trives issuing a statement against it on the puzzling grounds that "alternative avenues" toward more responsive government "have not been explored." Lawson gave no reason at all.[40]

40. Campaigners for each side stridently charged that the other side represented "special interest groups" and claimed to speak for democracy and heightened citizen participation.[41] The *Outlook*, for instance charged that the proponents of districting believed that "With the city divided into easily manipulated political units, they'd stand a lot better chance of filling those seats with hand-picked candidates than they ever would in citywide elections. It would amount to capturing city hall through the back door."[42] Jean Leslie Cornett, a member of the 1946 Board of Freeholders, defended her 30-year-old handiwork more positively, contending that the system was fair to all who could afford to be civic activists: "...anyone who has put down roots here, who has shown his/her concern by serving in school, church or civic organizations, and who has friends who will ring doorbells and speak out on his/her behalf can be elected to public office. It takes time and commitment, but most worthwhile things do."[43] On the other hand, backers of Prop. 3 maintained that districting would decrease the influence of "monied interests." Now, city council

members "feel accountable to no one except a bank or group of businesspeople." The current government was in "the grip of the land developer/real estate/ Evening Outlook...oligarchy that controls the city."[44]

41. All of the *Outlook*'s candidates for City Council and School Board won, but in 1975, unlike 1946, they included a black, Nat Trives, and a Latino, Fred Beteta, the first Latino to serve in a major public office in the city's history.[45] Trives led the balloting for City Council with 7927 votes, while the chief candidate of the Prop. 3 forces, Gary Robert Schwedes, finished fifth with 2769. The rain-dampened turnout amounted to only 17,333 (21,575 had voted on the charter in 1946), and Prop. 3 lost by 5060 to 11,179, although the petitions to qualify the measure had contained more than 10,000 signatures. In what the *Outlook* claimed were representative precincts in Ocean Park, Prop. 3 passed by 60-70% margins, but turnout was less than a third. North of Montana, Prop. 3 gained less than 20% of the votes, and turnout was nearly twice as high as in Ocean Park. Most significantly, in a black/Latino precinct bounded by Pico and Santa Monica Boulevards and 14th and 22nd streets, districting won only 37% of the vote on a 51% turnout of registered voters.[46] The newspaper did not publish comprehensive precinct-level returns.

42. Can it be shown that the at-large system, in this instance, was maintained for a racially discriminatory purpose? On the evidence that I have gathered so far, the answer is, on balance, negative: Trives and Lawson tepidly opposed Prop. 3, no major African-American or Latino spokespersons seem to have campaigned for it, there were no racial appeals for its defeat, and minority voters seem to have opposed in nearly the same proportions as Anglos did. The chief propagandist against districts, the *Outlook*, endorsed both Trives and Beteta, and it had long discarded such embarrassments as "The Little Savage." Santa Monicans had become more

tolerant in three decades, though racial issues did continue to plague this, as they did other communities, and the racial consequences of the electoral change were openly discussed. As a symbol of the new order in Santa Monica, Nat Trives was elected mayor by the other councilpersons later in April, 1975, after what the *Outlook* called a "tense drama."[47] Although it is possible that a more extensive examination might turn up other, more damaging evidence, it seems dubious at this point that a case for discriminatory intent could be made for the 1974-75 events.

FOOTNOTES

[1]Since all references in this report will be to the *Santa Monica Evening Outlook*, I will adopt the convention of simply citing the date, page, and column number. The facts referred to in the text at this point come from a story in the *Outlook* on April 9, 1975, p. 6, col. 4-5.

[2]March 11, 1975, p. 8, col 3-4; Nov. 30, 1945, p. 1, col. 2.

[3]Dec. 3, 1945, p. 1, col. 7-8; Dec. 5, 1945, p. 1, col. 1. There were 36 candidates for the 15 slots.

[4]Nov. 6, 1946, p. 1, col. 4-5.

[5]April 9, 1975, p. 1, col. 2 and p. 6, col. 4-5.

[6]Special U.S. Census, reported in *Outlook*, Oct. 18, 1946, p. 1, col. 2.

[7]Before 1980, Latinos are included in the "white" column.

[8]Oct. 18, 1946, p.1, col. 2.

[9]Nov. 13, 1945, p.3, col. 5; Nov. 20, 1945, p. 5, col. 4; Nov. 30, 1945, p. 11, col. 6.

[10]See e.g., Oct. 4, 1946, p. 4, col. 3-5.

[11]Oct. 4, 1946, p. 11.

[12]To the *Outlook*, the partisan struggle in 1946 was between "the party of free enterprise as opposed to collectivism." March 9, 1946, p. 4, col. 1-2. The Republican party took no formal position on the FEPC in California, and the party that reelected Earl Warren governor that year retained a good deal of its liberal civil rights heritage. The correlation discussed below between support for the charter and opposition to the FEPC did not merely reflect positions taken by the Republican party, for it declared on neither issue.

[13]·Oct. 28, 1946, p.4, col. 1.

[14]·Oct. 11, 1946, p. 8, col. 2.

[15]·Oct. 17, 1946, p. 6, col. 1.

[16]·March 11, 1975, p. 8, col. 3-4.

[17]·March 13, 1946, p. 1, col. 3. The newspaper did not report who voted for and against each proposal.

[18]·May 22, 1946, p. 1, col. 1.

[19]·June 27, 1946, p. 1, col. 2, p. 2, col. 1; July 1, 1946, p. 4, col. 2.

[20]·July 17, 1946, p. 1, col. 1.

[21]·March 5, 1946, p. 5, col. 5-6; March 6, 1946, p. 1, col. 2; March 14, 1946, p. 4, col. 1.

[22]·May 16, 1946, p. 4, col. 1.

[23]·March 23, 1946, p. 4, col. 1. Italics added.

[24]·Nov. 4, 1946, p. 1, col. 1.

[25]·Oct. 25, 1946, p. 24, col. 1. Capitalization in original.

25.Nov. 13, 1945, p. 3, col. 5; Nov. 30, 1945, p. 11, col. 6.

[27]·Nov. 23, 1945, p. 1, col. 7-8.

[28]·May 22, 1946, p. 1, col. 1; June 27, 1946, p. 1, col. 2.

[29]·Oct. 26, 1946, p. 1, col. 4.

[30]·Oct. 9, 1946, p. 1, col. 3.

[31]Nov. 7, 1946, p.1, col. 1.

[32]For introductions to "ecological regression," see Kousser, "Ecological Regression and the Analysis of Past Politics," *The Journal of Interdisciplinary History*, 4 (1973), 237-62; Laura Irwin Langbein and Allan J. Lichtman, *Ecological Inference* (Beverly Hills, CA: Sage, 1978). This technique has been used extensively in voting rights cases - for instance, in *Thornburg* v. *Gingles*, 106 S.Ct. 2752 (1986).

[33]The Pearson product-moment correlation coefficient between the two variables is 0.71 and the t statistic for the regression slope is 10.06, which is statistically significant at any reasonable level. A scatterplot of the percentages for the FEPC and the charter shows that the relationship is smooth and linear. Including the seven precincts in which the FEPC got a majority significantly worsens the statistical fit (the correlation declines to 0.62), and results in different estimates of the voting behavior of FEPC supporters and opponents. In this equation, 83%, rather than 93% of the FEPC opponents support the charter, and 67%, rather than 100% of the FEPC supporters oppose the charter. The scatterplot shows that the seven precincts deviate markedly from the regression pattern in the other 102 precincts. On methodological, as well as substantive grounds - I am concerned primarily with estimating *white* racial attitudes here - I prefer the first equation.

[34]Sept. 2, 1974, p. 11, col. 6-7; Sept. 4, 1974, p. 4, col. 5-7.

[35] March 28, 1975, p. 6, col. 1-2; April 1, 1975, special section; April 11, 1975, p. 1, col. 2-3.

[36]March 13, 1975, p. 8, col. 1-2.

[37]E.g., March 14, 1975, p. 13, col. 5-6.

[38]March 15, 1975, p. 1, col. 1-2.

[39]March 21, 1975, p. 1, col. 1-2.

[40]·April 4, 1975, p. 4, col. 3-5.

[41]·See the numerous council candidate statements in the *Outlook*, April 1, 1975, special section.

[42]·April 1, 1975, p. 6, col. 1-2.

[43]·March 20, 1975, p. 9, col. 1-2.

[44]·April 1, 1975, special section (statements by Gary Robert Schwedes, Sharon L. Gilpin, Richard S. Rosenthal).

[45]·March 28, 1975, p. 6, col. 1-2; April. 1, 1975, p. 6, col. 1-2. The retirement of incumbent William B. Campbell, who had served on the School Board for 12 years, paved the way for Beteta. The other winning School Board candidates were Anglo incumbents. March 5, 1975, p. 4, col. 7-8.

[46]·April 9, 1975, p. 1, col. 2; April 12, 1975, p. 2, col. 6-7.

[47]·April 16, 1975, p. 1, col. 3-4.